91-1298

No. 91-1298

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM W. PATY, *et al.*,

Petitioners,

v.

DOCTOR NUI LOA PRICE., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENTS DOCTOR NUI LOA PRICE, THE HOU HAWAIIANS AND KAMUELA PRICE IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

On July 21, 1989, Maui Loa, The Hou Hawaiians and Kamuela Price (hereafter called "Plaintiffs") filed suit in the U.S. District Court for the District of Hawaii, pursuant to 42 U.S.C. § 1983, for deprivation of their rights conferred by § 5(f) of the Hawaii Admissions Act, P.L. No. 86-3, 73 Stat. 4 (1959).

On September 13, 1989, the state defendants, including petitioners, filed a motion to dismiss, citing the following grounds:

> "1. The State of Hawaii has not waived its sovereign immunity and hence this suit is barred by the Eleventh Amendment.
>
> "2. The State officials acting in their official capacities are protected by the Eleventh Amendment from this suit.
>
> "3. Plaintiffs have failed to state a claim against the State officials in their individual capacities *because none of the allegations against the State Defendants focus upon any alleged acts or omissions in State Defendants' individual capacities.*
>
> "4. Neither section 5(b) nor section 5(f) of the Hawaii Admission Act has any relevance to this case because the land in question does not fit the dexcription (*sic*) of 'public lands' as the term is used in the Joint Resolution of Congress of July 7, 1898 and section 5(b) of the Hawaii Admission Act. Therefore, there is no substantial federal question presented in this complaint.
>
> "5. A claim under 42 U.S.C. § 1983 is not properly alleged in this complaint.
>
> "6. Plaintiffs lack standing to maintain this action." [Emphasis added.]

The district court dismissed the complaint against

the state and state officials in their official capacities on Eleventh Amendment grounds and dismissed the complaint against the state officials in their individual capacities because the complaint involves only action taken, or not taken, in their official capacities. Op. Br. App., p. 29.

The Court of Appeals affirmed the first ruling but reversed the second.

ARGUMENT

Petitioners (hereafter called "state officers") are officials and former officials of the State of Hawaii, charged with the duty of enforcing the trust established by § 5(f) of the Hawaii Admissions Act. Several decisions by the Court of Appeals for the Ninth Circuit have held that Hawaii state officials can be held personally liable for damages for breach of their duties as trustees. *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990); *Price v. State of Hawaii*, 921 F.2d 950, 958 (9th Cir. 1990). The Court of Appeals has also repeatedly held that native Hawaiians, as special beneficiaries of that trust, have standing to bring such a suit. *Price v. State of Hawaii*, 764 F.2d 623, 630 (9th Cir. 1984); *Napeahi v. Paty*, 921 F.2d 897, 901 (9th Cir. 1990); *Price v. Akaka, supra*, 928 F.2d at 826-7.

In *Paty v. Napeahi*, 116 L.Ed.2d 230 (U.S. No. 90-1937, filed June 17, 1991), many of the state officers herein, sought a writ of certiorari from this Court on the question whether the Ninth Circuit decisions on standing are correct. In *Paty v. Napeahi*, plaintiffs herein filed an *amicus* brief arguing that the issue of standing had not been properly raised in that case and should be litigated in this case, instead. Amicus Brief of The Hou Hawaiians, *et al.*, No. 90-1937 at page 13.

The issue of standing was thoroughly briefed and argued below in this case. However, it has not been raised in this petition. Instead, the state officers have raised three new issues that were not raised in the district court.

Qualified immunity. The first question presented in *this* petition, is whether the state officers have qualified immunity. In footnote 1 of the petition it is argued that the state officers "invoked *Harlow* immunity quite specifically" in the district court. However, it is clear from the passage cited from the record that qualified immunity was not discussed in the district court. The Court of Appeals did not improperly conclude that qualified immunity had not been raised in the district court.

There are several important reasons why the issue of qualified immunity should not be decided for the first time on appeal. It is not even clear whether the state officers are entitled to raise the defense in the first place.

Qualified immunity is an *affirmative* defense, which courts have conferred upon state officials to *quickly* terminate burdensome litigation which would distract them from their official duties. The state officers did not raise the issue promptly and have, therefore, waived it.

In *Hunter v. Bryant*, 112 S.Ct. 534, 536 (1991), the government officials moved for summary judgment in the district court on qualified immunity grounds. That point clearly distinguishes *Hunter* from the instant case. The Attorney General of the State of Hawaii has been criticized by the Hawaii Supreme Court for using the immunity issue as a dilatory tactic. *See Brown v. Wong*, 71 Haw. 519, 795 P.2d 283 (1990).

Further, qualified immunity only applies to *discretionary* functions. In this case, the plaintiffs complain that the state officers have allowed trust property to be wrongfully used for private purposes. If true, this is clearly prohibited by § 5(f). The state officers do not have discretion to allow trust property to be used for private gain. Op. Br. App., p. 50, ¶¶ 37-38.

The state officers' argue that § 5(f) allows them to presently grant trust land to the Honolulu Sailors Home, as a public purpose. However, in this case the *land* is not being used for a sailors' home. It has been leased for development to provide an income stream for the Sailors' Home Society. The terms of the trust allow only the use of *land* for any public purpose. This argument would allow the use of *income* from the trust for any public purpose, and would, therefore, render the trust meaningless.

The § 5(f) trust does not allow the use of income for the purportedly public purpose of establishing a sailors' home. This is not a discretionary function. Qualified immunity simply does not apply.

Pleading requirements. The second question presented in the petition is a technical pleading question which is substantially identical to the issue raised in *Akaka v. Price*, 116 L.Ed.2d 455 (U.S. No. 90-1941, filed June 18, 1991), by another group of state officials who also have duties as trustees under § 5(f). In *Akaka v. Price*, plaintiffs argued that they relied on *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) and *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980) in drafting the complaint. The grounds advanced by state officers for their motion to dismiss make it clear that they were aware that they were being sued in their individual capacities.

Therefore, it would be unfair for this Court to establish a new pleading rule, unless plaintiffs were allowed to amend the complaint. In the posture of this case, this will accomplish nothing but to delay this litigation. The Court denied the petition on this issue in *Akaka v. Price*, No. 90-1941, and ought to do likewise here.

Equal footing. The state officers argue that § 5(f) trust obligations impose an encumbrance on their public lands that deprives them of equal footing with the other states. The truth is actually quite to the contrary.

Upon admission to the union, the other states received only a small portion of the federal lands within their boundaries for the support of the public schools. The amount granted varied between one section per township in the Northwest Territory to four sections per township in the desert lands of Arizona and New Mexico.

Hawaii received especially favorable treatment on her admission to the Union. Hawaii received nearly all of the public land within the state--1.4 million of the total of about 1.7 million acres. Under the formula used in other admission acts. Hawaii would have received between 50,000 and 200,000 acres.

In consideration for the extra land and as a condition of statehood, Hawaii agreed to comply with the terms of the Hawaiian Homes Commission Act of 1920, and to use the land "for the betterment of the condition of the native Hawaiians", in addition to the usual purpose of providing for the public schools.

In spite of this great generosity on the part of the federal government, the state has done little or nothing to improve the condition of the native Hawaiians, since 1959. Meanwhile, the trust lands have been abandoned to private interests, as in the instant case, or leased

out at bargain basement rates to campaign supporters and political cronies of state officials. The meager income has been deposited into the state general fund. These accumulated deposits resulted in a surplus of $500 million, which was distributed to the voters as a tax rebate in an election year.

Due to the state's failure to comply with the Hawaiian Homes Commission Act, the condition of native Hawaiians has seriously deteriorated to the point where many are homeless. The state now blames the federal government for the problem and cites the deplorable condition of the native Hawaiians as the grounds for requests for billions of dollars in federal aid for the Hawaiian Homes program.

Based on the foregoing, plaintiffs certainly agree with the state officers that the nature and scope of the rights of native Hawaiians to sue to enforce the § 5(f) trust is a very important question of federal law that has not been but ought to be decided by this court.

However, the question presented in this petition is a very narrow question of federal law involving the equal footing doctrine. This is the state's strategy of delay--to present one narrow issue at a time, reserving many other arguments on the same point to be litigated later. This is why the issue of qualified immunity was not raised in the district court. By dragging out the litigation over many years, the state officers are confident plaintiffs will die, run out of money, or otherwise lose interest or the ability to pursue this litigation.

If certiorari is granted herein and plaintiffs prevail, the state officials will continue to raise other arguments to the effect that § 5(f) does not create a right enforceable by § 1983. The state has plenty of money and all the time in the world. Unfortunately, native Hawai-

ians do not. True native Hawaiians, i.e. those of at least 50 percent aboriginal blood, are a race of people at the point of extinction. Only a few thousand remain alive. Time is running out for the native Hawaiian.

Rather than grant certiorari in this petition, the Court should grant certiorari in *Price v. State of Hawaii*, (No. 91-1273, U.S. filed Jan. 28, 1992). That case is a petition by plaintiffs herein, from the same decision of the Court of Appeals. The issues presented there are whether the Eleventh Amendment precludes direct suit against the State of Hawaii to enforce the § 5(f) trust, whether the complaint states a claim for prospective injunctive relief against the state officials in their official capacities, and whether the private defendants are engaged in state action by retaining possession of property allegedly belonging to the trust corpus.

If certiorari is granted in that case, the state officers will be able to raise *all* of their arguments that § 5(f) is not enforceable under § 1983, including the standing issue which they so vigorously argued below but, have not mentioned herein.

CONCLUSION

For the foregoing important reasons, Respondents Maui Loa, The Hou Hawaiians, and Kamuela Price respectfully request this Court to deny the Petition for Writ of Certiorari to the Ninth Circuit herein and to *grant* the Petition for Writ of Certiorari in *Price v. State of Hawaii*, No. 91-1273, instead.

Dated: Honolulu, Hawaii, March 2, 1992.

Respectfully submitted,

Walter R. Schoettle
(Counsel of Record)